

SECTION 4: FEDERAL OVERSIGHT RELATIONSHIPS

Any analysis of state environmental or natural resource regulatory programs, particularly in the area of compliance and enforcement, should include a review of the relationships between those state programs and the federal government. Some of the programs included in this study are purely state initiatives without direct federal counterparts; Motor Vehicle Recycling and Disposal, Hard Rock Mining, Conservation Districts, Service Forestry, for example, and others. Many other programs, such as Air Quality, Water Quality, Solid Waste and others, are Montana's response to federal requirements to implement national initiatives set forth by Congress. The state/federal programs reviewed by the Environmental Quality Council in this study have various fiscal, oversight, and reporting relationships specifically with the U.S. Department of Interior's Office of Surface Mining (OSM) in the case of the state Coal Program, and with the Environmental Protection Agency (EPA) in the case of many of the pollution prevention programs administered by the Department of Environmental Quality.

Representatives of both agencies provided information to the EQC; Mr Eric Finke and Mr. John Wardell for the Helena Operations Office of the EPA and Mr. Guy Padgett for the Casper and Albuquerque Field offices of the OSM. Both agencies responded to a series of questions provided in advance. The written responses from these federal agencies are included here. The attachments referred to in the responses are not included in this document but are available for review at the EQC office in Helena.

Responses to Questions by EPA Representatives

1. Q: State "Primacy" to Administer Environmental Programs - What is it and How is it Achieved?

A: "Primacy" goes by many names, depending on the environmental program. For example, "primacy" is the terminology for an EPA-approved underground injection control or drinking water (public water supply) program, "authorized" for hazardous waste and NPDES programs, and "approved program" for the underground storage tank and municipal solid waste programs. Since Federal statutes and regulations use these terms specifically, "delegation" is the term this Response to Questions will use for generic reference to EPA approval of a state program.

The terminology for a delegated state program, as well as the showing that states must make to EPA in order to achieve it, are taken from the relevant statute. The procedural aspects of program approval are contained in EPA rules. The criteria that EPA uses to determine if the showing required by statute has been adequately been made are contained in EPA rules and/or guidance. Please refer to Table 1 for an illustration of the various terminologies for program approval, and other relevant information which helps explain the subtle differences between program approval in the different programs. For comparison purposes, Table 1 provides a description of the delegation standard from the relevant statute that a state must meet to receive delegation of an EPA program. Although this is not the only criteria that a state must meet, it is provided to illustrate the most significant condition that determines how flexible or tolerant EPA may be in accepting a state program that differs from the Federal program.

Delegation places the primary implementation of the delegable programs into the hands of the states. The delegation process also helps to achieve the extent of national uniformity in environmental protection sought by the statute. Although EPA retains authority to enforce or implement some aspects of delegated programs on a case-by-case basis, it removes the prospect of routine, duplicate (and perhaps contradictory) implementation by EPA and the states. In some cases, it is also a qualifying factor in a state's ability to receive Federal grants for environmental programs.

Not all programs are delegable to states by EPA. For example, the statutes for programs such as Superfund (CERCLA), PCBs under TSCA, the Oil Pollution Act (OPA), and EPCRA do not contain the language allowing EPA to delegate them to states; and the CWA gives primary implementation authority for the Dredge and Fill program to the US Army Corps of Engineers.

In general, seeking delegation is at the option of the state. In some cases, such as the Municipal Solid Waste program under RCRA Subtitle D, and State Implementation Plan (SIP) and Operating Permit programs under the Clean Air Act, the statute mandates that states develop certain aspects of the program and submit them to EPA for review and approval. As a condition of delegation, states must also update or revise their delegated program to keep up with changes made in the Federal program. For example, as new hazardous waste regulations are promulgated by EPA, an authorized state must develop companion regulations that are approvable, and submit to EPA an application to revise its authorization.

The process for achieving delegation is similar among environmental programs: States submit applications for program approval to EPA; EPA reviews the application and makes a tentative determination; EPA submits the application and its tentative determination to the public for review and comment; and EPA makes a final determination based upon the public comment it receives. The applications themselves also have similar components: a Governor's letter transmitting the application and requesting delegation; a certification by the state's Attorney General that the state has the requisite authority to carry out the program; a copy of all relevant state statutes and regulations; and a narrative description of the state's program.

As part of the delegation, the state must enter into a Memorandum of Agreement (delegation MOA) with EPA that defines the respective roles of the two agencies after delegation, provides for the sharing of information, and describes the process for transition of primary implementation responsibility from EPA to the state. And, if the Federal program has an enforcement component, the state must also enter into a Cooperative Enforcement Agreement with EPA. This agreement is described later in this response.

If a recurring Federal grant is available for the program, the state and EPA also develop annual program work plans, which serve as a joint program planning document, and become part of the state's grant applications. In Montana, these work plans are consolidated into a single document referred to as the Montana State/EPA Agreement (SEA). The Montana SEA describes the programmatic activities that the State will carry out in each environmental program area during the year as conditions of the grant awards. It also describes the activities that EPA will carry out in support of and oversight of the State's activities. The SEA is made available for public review and comment. The FY 96 Montana SEA is attached (Attachment 1).

For the committee's reference, Table 2 summarizes the status and extent of program delegation in Montana.

1a. Q: Are there different processes to achieve primacy for different programs?

A: The processes to achieve delegation of environmental programs are largely the same, in terms of what delegation applications should contain, and the public process EPA must follow in reviewing and approving or disapproving the applications. The processes of application and review are published by EPA as rulemaking in the Federal Register. Table 1 includes the relevant citations to Federal rule for each program. This process is described in the response to Question 1 above.

However, there are several exceptions to this general process. Regarding the approval of State implementation Plans (SIPs), states submit plans for attainment and maintenance of air quality, rather than an application for delegation. For the pesticides program, states submit Certification and Training Plans for EPA approval. Although these are considered plans rather than applications, many of the same components, such as relevant state statutes and regulations, must be included. Finally, the delegating instrument for pesticides enforcement primacy is the Cooperative Enforcement Agreement.

1b. Q: What is the typical timeframe to achieve primacy? Why do some programs take several years (or longer) to achieve primacy?

A: It is not possible to state a "typical" timeframe to achieve primacy. The timeframes to achieve primacy are comprised of the time necessary for: (1) a state to promulgate its own statutes and regulations; (2) a state to prepare and submit an application; (3) EPA to review the application and publish a tentative approval notice in the Federal Register; (4) the public to review and comment on the application; and (5) EPA to respond to public comments and prepare a final notice approving the application.

The actual time necessary to complete these steps depends on many factors, including how many resources the state and EPA are able to devote to the delegation process; how complete the state's application is; how well the state's application meets EPA's criteria for delegation (including the degree to which EPA may be flexible in accepting state programs which do not mirror EPA's); whether state statutory or regulatory changes are necessary to meet the criteria; the extent to which the application presents unique legal or implementation concerns; the degree to which the components of the application are highly technical (compared to administrative); the nature of public comment if the delegation is controversial; and others.

The timeframes for EPA to review and approve applications (steps 3 through 5 above) are set out in the relevant statute and/or Code of Federal Register (CFR) (see citations in Table 1), and vary from program to program. Following are a few examples of the statutory or regulatory timeframes for the period from receipt of a complete application to final approval by EPA:

- o SIP approval: 1 year
- o NPDES authorization: 90 days
- o MSW program approval: 180 days
- o PWSS primacy: 90 days
- o UST program approval: 180 days

1c. Q: What is the EPA attitude toward primacy? (Does EPA want states to have primacy?)

A: EPA encourages states to seek delegation of delegable environmental programs. (Note that not all environmental programs are delegable by EPA. Some programs like Superfund, PCBs under the Toxic Substances Control Act, and the Emergency Planning and Community Right to Know Act (EPCRA) programs are not delegable. See Table 2 for the complete status of program delegation in Montana.)

1d. Q: During the 1995 session, a bill (HB 440) was introduced to give environmental enforcement responsibility back to EPA. The fiscal note attached to the bill stated that this would save the State of Montana General Fund \$532,543 over the 96-97 biennium. Please comment on the relative cost of federal vs. state implementation of environmental programs. Could EPA handle implementation of Montana's programs? What would be a realistic prediction of the effect of such a change on the condition of Montana's environment? Are there any states that have pursued similar options?

A: EPA has not compiled relative costs of federal vs. state implementation of environmental programs. Although EPA is not anxious for states to turn delegated programs back to EPA, EPA would implement them, if necessary. Such a program might be a minimal one, with EPA enforcement as the primary means of doing so. It is not possible to predict what impact this might have on the condition of Montana's environment.

2. Q: So a Program Achieves Primacy... Then What?

A: When a program is delegated, the responsibility for direct implementation of the delegated aspects of the program transfer from EPA to the delegated state. Subject to the terms of the delegation MOA, EPA's role becomes one of providing support to the delegated state, and overseeing the state's performance. In all delegations, however, EPA retains the authority to implement aspects of the program on a case-by-case basis. For example, in assuming the implementer role for the NPDES program, the delegated state inspects sources for compliance with state requirements, reviews permit applications, issues permits, enforces against non-compliance, maintains the Permit/Compliance System (PCS) data base, and is the interface with the regulated community and the public for the NPDES program. EPA provides technical support, training, interprets Federal regulations if necessary, assists the state in overcoming programmatic obstacles where they might exist, and oversees the state's performance via the program grant work plan (SEA) and the Enforcement Agreement.

Real or apparent overlapping implementation between EPA and the delegated state may occur where (1) EPA has issued permits in the state prior to delegation, and by agreement with the state in the MOA, the EPA permits will not be immediately terminated; (2) EPA has promulgated new

regulations that are effective in the state, but the state has not yet adopted the new regulations, or delegation for these new regulations have not yet taken place; (3) or, by agreement with the state in the MOA, EPA maintains a co-implementer role for a temporary period as part of the transition of the program to the state (this would be rare).

As part of its oversight role after delegation, EPA oversees both permitting (where applicable) and enforcement as the primary program activities, and others that may also be applicable (such as pesticide applicator certification and training). The delegation MOA, for example, will specify which permit applications EPA will routinely review (e.g., major vs. minor wastewater discharge facilities), and the Enforcement Agreement (EA) will specify how EPA will oversee enforcement.

The EA delineates the enforcement responsibilities of both the delegated state and EPA. It also specifies the conditions under which EPA may exercise its own enforcement authority. The EA is the principal standard by which EPA evaluates the state's enforcement program. The terms of the EA are built from the terms of EPA enforcement policies. Both specify which violations are normally considered major or minor (other terminology may be used), what type of enforcement action (formal or informal) is normally appropriate, what is normally an acceptable time period between discovery of a violation and the taking of the appropriate action to return the violator to compliance, and when seeking a penalty is normally appropriate. The terms of "normal" timeliness and appropriateness may be adjusted by mutual agreement to suit the circumstances of each individual case. Copies of current Montana/EPA Cooperative Enforcement Agreements are attached (Attachments 2 through 6).

EPA encourages states to develop their own penalty policies. Most often, EPA penalty policies are used as the starting point, and state penalty policies frequently mirror those of EPA. Where a state penalty policy exists, EPA prefers to use the state policy when evaluating the appropriateness of state penalties, unless there are substantial differences between the EPA and state policies; otherwise, EPA will use its own penalty policy as an evaluation criteria.

2a. Q: What is the type and level of EPA involvement once a program achieves primacy? Does this vary by program? How is the level of federal monitoring and/or directing determined for programs with primacy? What about programs without primacy?

A: EPA's involvement after program delegation is described above. Where programs are not (or not yet) delegated, EPA retains full authority and responsibility for implementation. However, dependent upon the status of the state's own statutory and regulatory authority and programmatic capability, EPA may enter into an agreement with states to implement some or all aspects of the program for EPA when it is known that the state intends to seek delegation.

2b. Q: What are the "triggers" for EPA entry into an enforcement action? How does "overfiling" work? Is such entry predictable from the perspective of the regulated community? How do politics and/or publicity affect whether and when EPA will step in?

A: There are several ways in which EPA might become involved in an enforcement action in a delegated state: (1) the violation may be a Federal-only violation which could only be enforced by EPA (for example, use of an improper pesticide label); (2) the state could request EPA to participate in a joint action; (3) the state could refer the case to EPA; (4) EPA could determine that

the case is nationally significant, and request that the state turn the case over to EPA; (5) in its oversight capacity, EPA could determine that the state did not meet the timely and appropriateness criteria in the Enforcement Agreement (EA). The terms for EPA involvement in an enforcement action in a delegated state are contained in the EA.

"Overfiling" is the filing of an enforcement action by EPA when EPA has determined that a state's action has not met the timeliness and appropriateness criteria of the EA. In some cases, the delegated state has already taken or initiated an enforcement action of its own. In others, no state action has yet been filed. Where a state has already filed or will imminently file its own action, EPA prefers not to duplicate the terms of state's action, but would instead seek relief not sought by the state, such as additional injunctive relief, or greater penalty.

Although politics or publicity may make one case appear more glamorous than another, EPA relies solely on the terms of the Enforcement Agreement and the five "triggers" described above in determining when and if EPA enforcement action is necessary or warranted.

2c. Q: Testimony was received that EPA is "getting out" of some programs; which programs does this apply to, how, and why? What happens when EPA is "out"?

A: Specifically, this statement applied to the Underground Storage Tank (UST) program. The Director of EPA's Office of Underground Storage Tanks (OUST) has indicated that EPA plans to phase out its involvement in this program over a period of several years. This phase out follows naturally from the original concept of EPA's role in the UST program. EPA designed the Federal UST program as a "franchise", where EPA's only role would be one of state capacity-building, rather than as a Federal implementer. EPA intended that it's role would be minimal after state programs were approved. Although it is not possible to predict precisely what "getting out" would mean, some of the components of doing so could include downsizing EPA's UST office, reducing grant funds, providing less oversight and technical assistance, etc. EPA intends that states would ultimately operate approved UST programs with little or no EPA involvement.

2d. Q: Do you feel that state programs use the "threat" of EPA action as a tool for compliance (e.g., the "gorilla in the closet")? Please comment on your perspective of this aspect of the federal/state enforcement relationships.

A: EPA is aware that state enforcement programs occasionally make recalcitrant violators aware of the fact that EPA retains the discretion to take its own enforcement action on a case-by-case basis. EPA has committed to provide support to all aspects of state environmental programs, including enforcement, and does not object to states doing so.

3. Q: How is the State/Federal Relationship Working in Montana? What's Used to Measure State Program Success? (by program?)

A: Historically, EPA has evaluated state programs in two ways: (1) performance under the SEA work plan; and (2) performance under the Enforcement Agreement (EA). The program-specific work plans and EAs are used for this evaluation. These are by no means the sole criteria by which "success" would be measured. Many other measures, such as trends in environmental conditions, resources available to the state program, and size and makeup of the regulated universe

are also relevant considerations. EPA has relied on these two measures because they are negotiated agreements, and are measurable over a reasonable time period. EPA and the states are currently developing longer term measures which may replace or augment these two measures in the future.

EPA reviews state performance under the SEA work plan. At mid-year, EPA reviews the status of accomplishment of SEA milestones, with emphasis on obstacles encountered, problem solving, and mid-course adjustment of goals, if necessary. It is a review conducted principally among senior managers within EPA and the state. The year-end SEA evaluation is a more detailed assessment of achievement of the specific milestones in the SEA, and also serves to satisfy EPA grant requirements for an annual grant work plan review.

The timing and form of review of state enforcement performance is more program specific. In all cases, however, the program-specific EA is the evaluation standard used, with allowances made for case-specific circumstances. For example, the RCRA hazardous waste program performs a formal assessment of compliance monitoring and enforcement as part of the year-end SEA review. During this review, EPA assesses the timeliness and appropriateness of enforcement actions, and appropriateness of penalties assessed and collected. With state participation, Region VIII EPA developed a standard procedure for this review (see *Policy, Guidance, and Standard Operating Procedures for Oversight of Hazardous Waste Compliance Monitoring and Enforcement Programs, November 1993*) (Attachment 7).

Other EPA programs, such as Air and the water programs (PWSS and NPDES) review enforcement performance more frequently. EPA representatives from these programs meet with state representatives monthly to review the status of existing and developing cases, including the timeliness and appropriateness of enforcement actions, and appropriateness of penalties assessed and collected.

As a result of its history of exceptional performance among state pesticide programs, EPA Region VIII designated Montana's pesticide program as a participant in Region VIII's minimal oversight pilot program. EPA Region VIII presently conducts minimal conventional oversight of Montana's pesticide program. Oversight is generally limited to review of quarterly enforcement reports submitted to EPA as part of SEA requirements, and mid-year and year-end SEA reviews.

Finally, the EPA Municipal Solid Waste (MSW) program conducts little oversight of the state program. No program grant funds are available to states, and at the Federal level only citizen suit enforcement is permitted under RCRA Subtitle D, unless EPA disapproves a state program. Although there is discussion of the MSW program during mid-year reviews, the FY 96 SEA contains no MSW program work plan, and there is no EA for the MSW program.

3a. Q: Which Montana programs have achieved primacy? Which have not, and why?

A: Table 2 describes the status and extent of program delegation in Montana. Although it is in most cases the state's option to decide to seek delegation (see the Question 1 response above for exceptions), Montana has applied for delegation of all delegable EPA programs, except for the Class I, III, IV, and V wells of the UIC program.

3b. Q: What does EPA use to measure success? (Are the newly proposed evaluation criteria provided for the January Subcommittee meeting now in use?) Based upon these criteria, what kind of report card can Montana claim?

A: The response to Question 3 describes the criteria EPA uses to measure program "success". These criteria are contained in the State/EPA Agreement (SEA) work plans, and the Cooperative Enforcement Agreements (EAs). In Montana, the newly proposed criteria are not yet in effect. The new criteria referred to by this question are criteria designed to be used as part of the National Environmental Performance Partnership System (NEPPS) described in response to Question 5 below.

Based on the criteria contained in the Montana SEA and EA, EPA believes that Montana implements a set of effective environmental programs.

3c. Q: How would you characterize the EPA relationship with the regulated community in Montana? How would you characterize your relationship to the public interested in environmental protection in Montana?

A: EPA Region VIII and the EPA Montana Office strive to maintain a fair, impartial, and professional relationship with the regulated community in Montana. EPA employees are also public servants, and as such strive to maintain an open exchange of information with the public they serve.

4. Q: The Montana Experience vs. Other Nearby States

A: Region VIII-wide, the criteria used through FY 95 to evaluate state program and enforcement performance are similar to those used for Montana. Although SEAs are state-specific, they are all based on national EPA program guidance, adjusted to accommodate regional and state priorities. EAs are also based on national EPA enforcement policies and guidance. Although they may be less state-specific than SEA work plans, adjustments are still made to accommodate the particular nuances of some state enforcement processes.

4a. Q: Based on the information provided under the preceding topics, how does the treatment of Montana compare to the treatment of other, nearby states? How does the EPA report card for Montana compare with those for other, nearby states?

A: It is EPA's policy to evaluate all state programs on a similar basis. As stated previously, EPA relies on criteria contained in the SEA work plans and Enforcement Agreements in doing so.

For the Subcommittee's information, Table __ compares the status of program delegation among the six states in Region VIII (CO, MT, UT, ND, SD, WY), and Table __ compares the level of EPA enforcement action in all six Region VIII states over the last three years.

5. Q: Options for Improvement

A: Recently, EPA has implemented or piloted a number of programmatic and enforcement policies that might also benefit the State of Montana now or in the future. Among these are:

- (1) the National Environmental Performance Partnership System (NEPPS);
- (2) the Regulatory Reinvention Pilot Projects (Project XL);
- (3) the use of Supplemental Environmental Projects in enforcement actions;
- (4) a Small Community compliance policy;
- (5) a Small Business compliance policy;
- (6) an Environmental Audit policy; and
- (7) the use of the BEN model to estimate the economic benefit of non-compliance, and the use of the ABEL model to help evaluate a violator's ability to finance pollution-related expenditures.

A copy of a more detailed explanation of each of these is attached to this response (Attachments 8 through 15).

The *National Environmental Performance Partnership System* (NEPPS) project represents EPA's desire to place greater responsibility and accountability for planning and implementing environmental programs into state hands, with less traditional oversight and evaluation by EPA. Some states, like Colorado, have already embarked on this project. EPA anticipates other states will begin working with EPA on this basis during FY 97. The key components are:

- o Increased use of environmental indicators - greater use of results-based national and local environmental conditions, rather than bean counts, to measure long-term program effectiveness;
- o A new approach to program assessments by states - greater reliance on state self-assessments and sharing of information about environmental conditions and goals with the public;
- o Environmental Performance Agreements - a 2-year joint environmental performance agreement;
- o Differential oversight - Lesser Federal oversight on state programs that perform well, and program-wide, limited after-the-fact reviews, rather than case-by-case intervention;
- o Performance Leadership programs - national recognition and minimum oversight for states that achieve Performance Leadership status based on their Environmental Performance Agreement;
- o Public outreach and involvement - sharing with the public the state of environmental conditions, goal- and priority-setting, alternative approaches to

environmental protection, and evaluation of this new approach to joint state/EPA environmental management;

- o joint system evaluation - the success of this approach will be judged by its effectiveness, public credibility, fiscal soundness, and program accountability.

Project XL is being implemented by EPA on a pilot basis. Announced in May 1995, Project XL gives a limited number of regulated sources the flexibility to develop alternative strategies that will replace or modify specific regulatory requirements on the condition that they produce greater environmental benefits. EPA anticipates that 50 projects will eventually be selected in four areas - facility-specific, industry-wide, government agencies, and communities.

Supplemental Environmental Projects (SEPs) are environmentally beneficial projects that a violator agrees to undertake, but which the violator is not otherwise legally required to perform. The SEP often brings about environmental and public health benefits that a pure penalty action would not achieve, such as pollution prevention, additional pollution reduction, public education, or environmental justice. The SEP becomes part of the enforcement settlement, and EPA considers the violator's willingness to perform an SEP when determining an appropriate and fair penalty amount. Using computer software known as PROJECT, EPA determines the after-tax cost of the SEP based on the violator's estimated cost of performing the SEP.

EPA's *Policy on Flexible State Enforcement Response to Small Community Violations* (Small Community Policy) states that EPA will accept a flexible state enforcement response to violations by small communities (fewer than 2500 residents). This flexibility assures states that EPA will not overfile, and promotes alternative strategies for small communities to meet environmental and economic goals. In order to qualify for treatment under this policy, states must establish a process to provide compliance assistance, screen communities for participation, assess good faith, establish risk-based priorities among violations, and ensure prompt correction of violations. The policy does not apply to criminal violations.

The *Policy on Compliance Incentives and Penalty Waivers for Small Businesses* applies to businesses of 100 or fewer individuals on a company-wide basis. Under this policy, EPA will eliminate the entire civil penalty if all qualifying criteria are met, will eliminate the entire gravity component of the penalty if all but the fifth criteria are met, or will mitigate the penalty to the maximum extent possible if the business has made a good faith effort to comply. The criteria are: (1) the business must have sought compliance assistance from a non-confidential government or government-supported program, and the violations must be detected during that assistance; (2) this is the business's first violation of the requirement; (3) the violation must not have resulted in actual harm to public health, safety, or environment; (4) the violation does not involve criminal conduct; and (5) the business corrects the violation in 90 days, or enters into an enforceable agreement to correct the violations if a longer period is necessary.

EPA's *Incentives for Self-Policing: Disclosure, Correction, and Prevention of Violations* policy, otherwise known as the environmental audit policy, provides incentives for regulated entities of all kinds to voluntarily discover and correct its own violations. Under this policy, EPA will (1) waive 100% of the gravity component of the penalty where the violation was discovered via an environmental audit or "due diligence", or 75% of the gravity component where the

violation was found via any voluntary means; (2) not recommend for criminal prosecution a violation so discovered; and (3) not request audit reports to initiate civil or criminal investigations. There are 9 conditions that the regulated entity must meet to qualify for treatment under this policy. They include: discovering the violation(s) during a systematic, objective, and periodic environmental audit, or other documented procedure reflecting due diligence, and not through a monitoring, sampling, or audit procedure already required of the regulated entity; disclosing the violation in 10 days; correcting the violation in 60 days; discovery must be prior to the imminent discovery by a regulatory agency, third party, or "whistleblower"; the violation must not have resulted in actual, serious harm; and the violation must not have occurred previously within the last 3 years, or be part of a pattern of violation's by the facility's parent organization within the last 5 years. EPA is aware that Montana is developing a similar policy.

The *BEN Model* is used by EPA to compute economic benefit that a violator may have realized as a result of noncompliance. EPA strongly believes that recovery of economic benefit at a minimum as part of a penalty assessment is critical to maintaining a strong incentive for compliance. The use of the BEN model standardizes the computation of economic benefit, so that each violator that experiences economic benefit is treated similarly and reasonably. The recovery of economic benefit levels the playing field among regulated entities. The *ABEL Model* assists EPA in evaluating a firm's ability to finance penalties, cleanups, and pollution control expenditures.

5a. Q: Do EPA staff have any suggestions for improvements? Are there "success stories" from other states that might address topics addressed by the Subcommittee?

A: EPA has piloted or adopted a variety of new programs and policies to adapt its own programs to changing needs. Montana may want to consider the appropriateness of adopting some or all of them (see response to Questions 5 above).

EPA representatives have also been requested to respond where possible to comments made by a participant at the March 20-21 Subcommittee meeting, as follows:

Comment: [paraphrased here due to its length]

EPA is a "shadow at the table" of state enforcement. The permittee never knows for sure whether EPA will be satisfied.

The commenter also noted the use of the BEN model is ineffective and inconsistent. He noted an enforcement action against nitrate discharges into Libby Creek, where other dischargers were emitting much higher levels with no requirement to monitor, like the highway project with significant blasting with no oversight at all. Libby Creek flows into the Kootenai River which flows into Canada. Canada puts nitrate into the river as a nutrient. He suggested the State use BEN with discretion.

He suggested the Subcommittee be slow in recommending changes to the water quality program's new compliance manual before seeing if it works.

Response:

In response to the first comment regarding EPA as a "shadow at the table" of State enforcement, EPA believes it makes clear what its enforcement expectations are in both the Enforcement Agreement and periodic enforcement case review meetings with the State enforcement agencies.

In the second comment, the commenter appears to confuse the use of the BEN model with both State or Federal policy determinations of what activities are to be regulated, and with equitable enforcement of the requirements placed on those activities. The BEN model is strictly a tool to determine the amount of economic benefit a violator might have realized as a result of his/her non-compliance. It does not help decide when to take an enforcement action, nor does it determine whether State or Federal environmental standards are equitable in terms of unregulated activities. These are discretionary and policy decisions made in other formats and contexts broader than a single alleged violation. The activities of a foreign government certainly play no part in determining economic benefit via the BEN model.

Finally, EPA applauds the Water Quality Division for development of its new compliance manual, and agrees that the Division should have the opportunity to gain more experience under the new manual before making significant changes.

Table 1. Selected Information Regarding Delegation of EPA Environmental Programs

Program	Year delegated to Montana	Terminology for delegation	Delegation standard	CFR and statutory citations relevant to delegation	If an overfile were to occur after delegation, would EPA enforce federal or state requirements?	Recurring federal grant available? Minimum required state share	Is grant contingent upon delegation?
Air	Various dates from 1972 to present	State Implementation Plans. Approved SIP	SIP must provide for attainment of National Ambient Air Quality Standards as expeditiously as practicable	40 CFR ¹ Part 51 and 52 CAA 110	State regulations and permit provisions	Yes/MOE ² +33%	No, grants are also available for program development
	1980	New source review: Approved as part of SIP	Same as above	Same as above	Same as above	Same as above	Same as above
	1977	New source performance standards (NSPS): Approved as part of SIP	Same as above	Same as above	Same as above	Same as above	Same as above
	1983	Prevention of significant deterioration (PSD): Approved as part of SIP	Same as above	Same as above	Same as above	Same as above	Same as above
	1977	Asbestos NESHAP: Approved as part of SIP	Same as above	Same as above	Same as above	Same as above	Same as above
	1995	Operating Permits: Approved (currently interim approval)	State requirements must be at least as stringent as Federal	40 CFR Part 70 CAA 502(d)	Same, but not "state-only" requirements	Program is funded by state permit fees	Not applicable
	1995	Air Toxics: Approved (permit mechanism only)	State requirements must be at least as stringent as Federal	CAA 112(1)	State regulations and permit requirements	Same as above (funded by both grants and fees)	No, grants are also available for program development
	1995	Acid Rain: Approval	State regulations must be consistent with Federal	Not applicable - implemented via operating permits	State regulations and permit requirements	Not applicable, part of operating permit program	Not applicable

¹ CFR = Code of Federal Regulation

² MOE = Maintenance of Effort. Section 105 of the Clean Air Act requires states to commit to their air programs at least the same dollar amount of funds that were committed in the previous fiscal year.

Program	Year delegated to Montana	Terminology for delegation	Delegation standard	CFR and statutory citations relevant to delegation	If an overfile were to occur after delegation, would EPA enforce federal or state requirements?	Recurring federal grant available? Minimum required state share	Is grant contingent upon delegation?
Hazardous Waste (RDRA Subtitle D)	1984	Authorized	State program must be equivalent to Federal, and consistent with Federal and other State programs	40 CFR Part 271 RCRA 3006(b)	After authorization but prior to codification, Federal regulations; after codification, State regulations and permit requirements	Yes/25%	No, grants are also available for program development
Municipal solid waste (RCRA Subtitle D)	1993	Approved program	State program must be adequate to ensure compliance with Subtitle D, MSWLF ³ criteria	40 CFR Part 239 (proposed) RCRA 4005(c) and 4007	Neither after approval (enforcement of Federal requirements is limited to citizen's suit); Federal regulations after disapproval	No ⁴	Not applicable
Wastewater Discharge Permitting (NPDES)	1978	Authorized	State program must apply, and insure compliance with, the requirements of CWA sections 301, 302, 306, 307 and 403	40 CFR Part 123 CWA 402(b)	State permit requirements, ⁵ or Federal regulations where no permit was issued	Yes/MOE ⁶	No, grants are also available for program development
Pesticides (FIFRA)	1976	Certification: Approved Plan	State certification standards must conform with federal State must have adopted adequate pesticide use laws and regulations	40 CFR Part 171 FIFRA 11 FIFRA 26	Not applicable Federal regulations	Yes/50% Yes/15%	No, grants are also available to develop certification program

³ MSWLF = Municipal Solid Waste Landfill

⁴ Although recurring program grants are not available for the Municipal Solid Waste Program, EPA has provided some one-time grants to MDEQ for recycling and solid waste promotion and education.

⁵ CWA section 106 grants provide funding for a variety of Clean Water Act-related activities, of which the NPDES program is one.

⁶ MOE = Maintenance of Effort. Section 106 of the Clean Water Act requires states to maintain in subsequent years the level of funding committed by the State the first year after it received NPDES program delegation.

Program	Year delegated to Montana	Terminology for delegation	Delegation standard	CFR and statutory citations relevant to delegation	If an overfile were to occur after delegation, would EPA enforce federal or state requirements?	Recurring federal grant available? Minimum required state share	Is grant contingent upon delegation?
Public Water Supply Supervision (PWSS)	1978	Primacy ⁷	State regulations must be at least as stringent as Federal	40 CFR PArt 142 SDWA 1413	Federal regulations	Yes/25%	First grant is contingent upon applying for primacy, continued eligibility is contingent upon establishing and maintaining primacy
Underground Injection Control, Class II (UIC)	Probable 1996, to Oil and Gas Conservation Division	Primacy	State program must represent and effective program to prevent injection which endangers drinking water sources	Guidance ⁸ SDWA 1423	State permit requirements, or state regulations where no permit had been issued.	Yes/25%	First grant is contingent upon applying for primacy, continued eligibility is contingent upon establishing and maintaining primacy
Underground Storage Tanks (UST, RCRA Subtitle 1)	1996	Approved program	State requirements must be no less stringent than Federal	40 CFR PArt 281 RCRA 9004	State requirements	Yes/25%	No, grants are also available for program development

⁷ Primary Enforcement Responsibility

⁸ No procedural rule was published regarding granting of primacy for UIC Class II wells. Instead, EPA issued guidance for this class of wells. See 50 CFR 27334, published May 19, 1992.

Table 2. Status and Extent of Program Delegation in Montana

<u>Program</u>	<u>Status and Extent of Delegation</u>	<u>Delegated Agency</u>
NPDES	Completely authorized except for pretreatment and sludge.	MDEQ
CWA 404	Not delegable.	
PWSS	MT has primacy.	MDEQ
UIC Class II	MT has applied for primacy, and approval is expected imminently.	MDEQ
UIC Classes I, III, IV, V	Primacy not applied for.	
CERCLA	Not a delegable program, but MT participates with EPA via cooperative agreements.	
RCRA Subtitle C	Authorized for "base program", plus all regulatory changes up through July 1, 1989 (Non-HSWA Cluster IV). MT has applied for authorization of additional program elements such as Land Disposal Restrictions, Corrective Action, and Burners/Industrial Furnaces, and authorization is anticipated in the near future.	MDEQ
RCRA Subtitle D (MSWLFs)	Approved for Part 258, Municipal Solid Waste Landfills.	MDEQ
RCRA Subtitle I (UST)	Approved.	MDEQ
Air	See Table 2a., following.	MDEQ
FIFRA	Certification and training plan approved. Primacy granted for enforcement. MT also implements worker protection, ground water protection, and endangered species programs under FIFRA.	MDA

TSCA	MT has an EPA-approved certification and accreditation program under the Asbestos Hazard and Emergency Response Act (AHERA) for the asbestos-in-schools program. No other aspects of TSCA are delegable.	MDEQ
EPCRA	Not a delegable program. EPCRA 311 and 312 reports of stored hazardous materials are submitted to state and local emergency planning committees by industry. EPCRA 313 reports of releases to the environment are reported by industry to EPA.	
OPA	Not a delegable program.	

Table 2a. Montana Air Program Delegation Detail

<u>Provision</u>	<u>Status of Approval</u>
Prevention of Significant Deterioration	Approved as part of SIP, except for 6 permits issued by EPA
New Source Review	Approved as part of SIP
Asbestos	Approved as part of SIP
Ozone Protection (CFCs)	Approval not applied for
Acid Rain	Approved
Operating Permits	Interim approval granted
New Source Performance Standards	All NSPS state regulations approved in State Implementation Plan except Subpart UUU Calciners and Dryers in Mineral Industries
National Emission Standards for Hazardous Air Pollutants	Approved provisions: General provisions Beryllium Be Rocket Motor Firing Mercury Vinyl Chloride Equipment Leaks of Benzene Benzene from Coke By-product Recovery Asbestos Inorganic Arsenic from Glass plants Inorg As from Primary Copper Smelters Inorg As from AsO3 and As Production Equipment leaks Benzene from Benzene Storage Vessels Benzene from Benzene Transfer Ops Benzene Waste Operations
Air Toxics	Partially approved

Table 3.

Comparison of Delegation Status¹ Among Region VIII States

Program	Current Delegation Status ²					
	CO	UT	MT	WY	ND	SD
Air: SIP	D	D	D	D	D	D
New Source Review	D	D	D	D	D	D
NSPS	D	D	D	D	D	D
PSD	D	D	D	D	D	D
NESHAPS	D	D	D		D	
Operating Permits	D	D	D	D	D	D
Air Toxics ⁵	D				D	
Acid Rain	D	D	D		D	D
Ozone Protection (CFCs)						
Hazardous Waste	D	D	D	D	D	D
Municipal Solid Waste	D	D	D	D	D	D
Wastewater Discharge (NPDES)	D	D	D	D	D	D
Pesticides	D ³	D	D	D ⁴	D	D
Public Water Supply (PWSS)	D	D	D		D	D
UIC Class II	D	D	A	D	D	D
UIC Classes I, III, IV, and V		D		D	D	
Underground Storage Tanks		D	D		D	D

Footnotes:

1 Includes delegable programs only.

2 D = Program is delegated to state (either partial, conditional, interim, or final).
 A = Delegation expected imminently.
 Blank = Not delegated.

3 CO has enforcement primacy and certification plan approval for commercial applicators only.

4 WY has an approved certification plan, but does not have enforcement primacy.

5 D indicates adoption of most or all of the current 16 EPA MACT standards. Blank indicates adoption of few or none.

Table 4.

Level of EPA Enforcement¹ in Region VIII States
October 1, 1993 Through January 18, 1996
By Program

State	Number of Formal Enforcement Actions Taken ²							Total
	Air ³	NPDES	Pesticides	Haz Waste	UST	PWSS	UIC	
CO	7	8	21	5	19	116 ⁵	2	177
UT	1	1	3	0	2	4	2	13
MT	12	6	1	0	10	4	19 ⁴	52
WY	2	9	8	13 ⁴	48 ⁴	98 ⁴	0	177
ND	0	4	10	1	10	0	0	25
SD	0	14	4	1	22	4	0	45

Footnotes:

- 1 Readers are cautioned that the level of EPA enforcement in a delegated state is not an indicator of the quality or effectiveness of a state enforcement program. There are many events that could trigger EPA enforcement in a delegated state. See EPA's narrative response to Question 2b for a discussion of possible triggers for EPA enforcement in a delegated state.
- 2 Includes Notices of Violation (PWSS and UIC), administrative enforcement actions, civil complaints, and cases filed by US Department of Justice for EPA. Excludes non-delegable programs (EPCRA, CERCLA, OPA, TSCA, and CWA Dredge and Fill). Data taken from EPA Region VIII Enforcement Docket System. No record is kept in this system as to the "trigger" for EPA enforcement (e.g., referral to EPA by state, EPA overfile, joint EPA/state action, etc.)
- 3 Includes CFC enforcement cases for which no states are delegated. The Enforcement Docket System does not allow segregation of these cases from other types of Air Program enforcement actions.
- 4 Throughout most or all of this period, the state had not been delegated this program, and these numbers represent enforcement action taken by EPA in the implementer role.
- 5 This number represents cases referred to EPA by the State.

RESPONSE BY
UNITED STATES DEPARTMENT OF INTERIOR
OFFICE OF SURFACE MINING

1. State "Primacy" to administer environmental programs---What is it and how is it achieved?

Response: Primacy under the Surface Mining Control and Reclamation Act of 1977 (SMCR: P.L. 95-87) allows states to permit, inspect, and enforce coal mining reclamation activities using state laws and regulations.

Montana obtained primacy by adopting laws and regulations which were no less effective than the federal counterparts in achieving reclamation objectives for surface coal mining activities. These state laws and regulation, commonly referred to as the "State Program", were submitted to and approved by the Secretary of Interior. The Montana State Program was approved and Montana granted primacy in February of 1982.

The process for approving a State Program under SMCRA is described in 30 CFR Part 732 (copy included.) The federal approval of Montana's program is published in 30 CFR 926 (copy included).

2. So a program achieves primacy...then what?

Response: Once a state has obtained primacy, the state becomes responsible for the permitting, inspection and enforcement of the state laws and regulations governing permitting and reclamation activities for surface coal mining. The state may at its choice, regulate coal mines located upon Federal lands. The federal Agency, the Office of Surface Mining (OSM), provides funding and technical assistance and monitors the state's performance by conducting evaluations, periodic inspections and program reviews.

OSM's periodic review or "oversight", evaluated the effectiveness of the State Program in achieving reclamation objectives. In addition, oversight evaluates the state's performance in complying to it's approved program. Oversight results are summarized in Annual Reports (the annual Report for Montana for 1994 is included as an attachment.)

In addition to oversight and technical and financial support, OSM may exercise its "backup" enforcement powers should the state fail to take appropriate enforcement actions under the State Program.

OSM may periodically require the state to develop rules and regulations or "update" its program such that it remains no less effective than the federal counterpart. Finally, OSM may initiate actions to retract approval of all or part of an approved program.

3. How is the State\Federal relationship working in Montana? What is used to measure program success?

Response: The State of Montana and OSM have a cordial and professional working relationship. Reclamation of mined areas is effective and prompt, the industry has consistently demonstrated a high level of compliance with State law, and oversight rarely reveals weaknesses or problems associated with the State Regulatory Authority. When problems are identified, the State and OSM generally work together on the Bureau level to achieve resolution; on rare occasions, where issues cannot be resolved on the local level, they have been elevated to the Governor\Secretarial level.

4. The Montana experience vs. other (nearby) States.

Response: The Casper field office and the Albuquerque Field Office administer grants and conduct oversight in the states of Wyoming, North Dakota, Montana, and New Mexico. These States all conduct excellent programs.

5. Options for improvement.

Response: The State and the Agency have initiated efforts to be more receptive to the needs and concern of the coal field citizens and the industry. Joint meetings with citizens\industry to encourage outreach and suggestions for developing annual oversight topics will encourage constructive citizen\ industry participation and will provide more meaningful feedback to the state and federal regulators. The State and OSM have focussed more effort and attention on reviewing "on-the-ground" achievements and have de-emphasized procedural reviews which have had limited utility.

The two Agencies have directed more resources into technical support and assistance. Initiatives involving GIS and electronic permitting should produce future dividends by improving and streamlining permitting while reducing costs to the industry and the public.

Such efforts, which foster creative and constructive participation among interest groups (Agencies, the public, and industry) must be encouraged and expanded.